In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 296

JOSEPH L. SWITZER AND RICHARD A. WARD,
PETITIONERS

v.

JOHN A. MARZALL, COMMISSIONER OF PATENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 13–16) is reported at 94 F. Supp. 52. The opinion of the District Court denying respondent's motion for relief from the decree authorizing issuance of letters patent to plaintiffs (Appendix to Petition, pp. i–vi) is reported at 95 F. Supp. 721. The opinion of the District Court denying respondent's motion requesting the trial court to apply to the Court of Appeals for remand (Ap-

pendix to Petition, pp. vii–xi) is reported at 96 F. Supp. 332. No opinion was rendered by the Court of Appeals.

JURISDICTION

The order of the Court of Appeals (R. 228), denying petitioners' motion for summary dismissal of respondent's appeal, was entered on June 6, 1951. The petition for writ of certiorari was filed on August 31, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Commissioner of Patents has a right to appeal to the Court of Appeals from an adverse ruling in the District Court in an R. S. 4915 proceeding holding an applicant for a patent to be entitled to letters patent.

STATUTE INVOLVED

Revised Statute 4915, as amended, 35 U. S. C. 63, reads as follows:

> Whenever a patent on application is refused by the Board of Appeals or whenever any applicant is dissatisfied with the decision of the board of interference examiners, the applicant, unless appeal has been taken to the United States Court of Customs and Patent Appeals, and such appeal is pending or has been decided, in which case no action may be brought under this section, may have remedy by bill in equity,

if filed within six months after such refusal or decision; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication and otherwise complying with the requirements of law. In all cases where there is no opposing party a copy of the bill shall be served on the commissioner; and all the expenses of the proceedings shall be paid by the applicant, whether the final decision is in his favor or not. In all suits brought hereunder where there are adverse parties the record in the Patent Office shall be admitted in whole or in part, on motion of either party, subject to such terms and conditions as to costs, expenses, and the further cross-examination of the witnesses as the court may impose, without prejudice, however, to the right of the parties to take further testimony. The testimony and exhibits, or parts thereof, of the record in the Patent Office when admitted shall have the same force and effect as if originally taken and produced in the suit.

STATEMENT

This is an action by petitioners under R. S. 4915, as amended, 35 U. S. C. 63 (*supra,* pp. 2–3) against the Commissioner of Patents to secure an allowance of their patent application, Serial No. 430,792, filed February 13, 1942, on their alleged invention of "Fluorescent Textiles." On December 13, 1950, the district court authorized respondent to issue petitioners a patent on their application (R. 17–20). On February 10, 1951, two days short of the expiration of the 60-day appeal period, respondent filed a notice of appeal to the United States Court of Appeals for the District of Columbia Circuit from this decree (R. 21). In the appeal, it was urged that the District Court had erred in holding the claims in issue patentable notwithstanding the fact that the court had held that the references relied upon by respondent disclose the material and process steps utilized by petitioners and that their product claims utilize functional and indefinite language at the exact point of novelty (R. 204–205).

Prior to the filing of notice of appeal, respondent filed on January 30, 1951, a motion under Rule 60 (b), Federal Rules of Civil Procedure, "for relief from the decree on the ground of newly discovered evidence (an alleged anticipation by the prior art, of which defendant was ignorant at the time of trial)." On March 2, 1951, the District Court denied respondent's

motion on the ground that it had been divested of jurisdiction to entertain the motion after respondent filed its notice of appeal. 95 F. Supp. 721; Appendix to Petition, pp. i-vi. On March 16, 1951, respondent's motion requesting the trial court to apply to the Court of Appeals for remand of the case, "based on a claim of newly discovered evidence of which defendant was excusably ignorant, which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b) of the Federal Rules of Civil Procedure", was denied by the District Court. 96 F. Supp. 332; Appendix to Petition, pp. vii–xi.

Respondent's appeal was perfected by the filing of a transcript of record on April 10, 1951, and the filing of a brief and printed appendix on May 19, 1951. On May 4, 1951, petitioners filed a motion in the Court of Appeals (R. 205) for summary dismissal of respondent's appeal on the grounds that (a) the District Court's decree of December 13, 1950, was interlocutory as to respondent, and thus the Court of Appeals was without jurisdiction, under 28 U. S. C. 1291 and 1292, to hear the appeal, or (b) the decision and decree of the District Court was, "under decisions of this Court, conclusive upon respondent" (Pet., p. 3). On June 6, 1951, the Court of Appeals entered a *per curiam* order (R. 228), denying this motion.

ARGUMENT

1. At the outset, we submit that this case is not yet ripe for review by this Court. The denial of petitioners' motion for summary dismissal of respondent's appeal by the court below did not put an end to the controversy or resolve the issues between the parties. Consequently, the petition for a writ of certiorari in this case seeks review of an interlocutory order of the Court of Appeals (*Berman* v. *United States*, 302 U. S. 211, 212–213), a request which this Court rarely grants, and then only in unusual circumstances (*Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U. S. 251, 258, and cases cited). We do not believe that this case falls within the class of "extraordinary cases" (see *Hamilton Shoe Co.* v. *Wolf Brothers*, *supra*, and *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, 685, n. 3) in which the writ of certiorari is sometimes granted by this Court to review an interlocutory order of a lower court, since it is clear that review here is not "fundamental to the further conduct of the case."[1]

[1] The District Court has already heard and decided the case on the merits. In neither the *Hamilton Shoe Co.* nor *Larson* case had the issues been heard or decided on the merits in the trial court. In the instant case, should the Court of Appeals affirm the decision of the trial court, there will, of course, be no need for a review on the question presented in the petition for a writ of certiorari. In any event, failure to review here will not require the case to be remanded for an extended trial as would have been the case in the *Hamilton Shoe Co.* and *Larson* cases.

2. Moreover, there is no merit to the grounds on which the writ of certiorari is here sought. Petitioners urge (Pet. 6–7) that the Commissioner of Patents had no authority to appeal from the adverse district court decision, relying on two propositions: (1) That the judgment of the District Court holding that petitioners are entitled to letters patent is interlocutory and not final and thus not appealable by respondent; (2) that the judgment of the District Court is conclusive upon respondent. Aside from the obvious inconsistency of these two propositions, neither has any substance.

(a) Petitioners rely on this Court's decision in *Hoover Co.* v. *Coe.*, 325 U. S. C. 79, to support their contention that the judgment of the District Court is interlocutory only.[2] In that case this Court recognized that the Patent Office may cite new references or declare an interference after a case is remanded by a district court. Petitioners attempt to argue from the *Hoover* case that "Because the District Court below remanded the case to the Patent Office for further proceedings,

[2] The *Hoover* case involved the question of the jurisdiction of the District Courts in an R. S. 4915 proceeding, where the court was not asked to determine the right of an applicant to receive a patent but was instead requested to direct the examiner to allow claims for the purpose of provoking subsequent interference proceedings.

It should be noted that neither the *Hoover* case nor any other case cited by petitioners directly supports the contention advanced by them.

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in which proceedings in the Patent Office new references could be cited or interference declared, the decision from which respondent appealed to the Court below clearly is not a 'final' decision" (Pet. p. 13). This is an unjustified blurring of judicial recognition of the practical and possibly continuing relationship in the future between an applicant and the Patent Office, based on material not presented in the concluded litigation. Here, the Commissioner seeks review in the Court of Appeals of a decree which, if undisturbed, is conclusive as to the matters which it embraces and is, therefore, final in the most familiar judicial sense.

The right of the Commissioner of Patents to appeal from adverse decisions in R. S. 4915 proceedings is supported by direct authority. In *Robertson* v. *Cooper,* 46 F. 2d 766 (C. A. 4), a case squarely in point, appellee brought an action under R. S. 4915 against the Commissioner to secure three design patents on three different fonts of type which the Commissioner of Patents had refused to grant. The District Court held in favor of appellee and entered a decree authorizing the Commissioner to issue a design patent to appellee. The Commissioner appealed from the decree. In reversing the judgment of the lower court, the Court of Appeals for the Fourth Circuit stated (p. 769):

> It is contended on behalf of the appellee that no appeal lies from a decision in his

favor in a suit of this character. We cannot agree to this contention, as appeals of this character have been considered by appellate courts, and by this court in *Robertson* v. *General Electric Co.,* 32 F. (2d) 495.

Moreover, appeals by the Commissioner of Patents have long been entertained by this Court and Courts of Appeals without question as to the right of the Commissioner to appeal. See, *e. g., Butterworth* v. *Hill,* 114 U. S. 128; *Ewing* v. *Standard Oil Co.,* 42 App. D. C. 321; *Robertson* v. *General Electric Co.,* 32 F. 2d 495 (C. A. 4); *Coe* v. *Hobart Mfg. Co.,* 102 F. 2d 270 (C. A. D. C.). See, also, 26 Journal of the Patent Office Society, 651, 652.

(b) Petitioners' further argument that respondent is denied the right to appeal from an adverse ruling in an R. S. 4915 proceeding on the ground the judgment of the District Court is conclusive upon respondent is equally unsupportable.[3] Petitioners endeavor to draw from the language of this Court's decision in the *Hoover* case the conclusion that because an R. S. 4911–14 (35 U. S. C. 59a–62) proceeding is conclusive

[3] This Court has held that the public has a substantial interest in the granting of every patent. *Densmore* v. *Scofield,* 102 U. S. 375; *Mercoid Corp.* v. *Mid-Continent Co.,* 320 U. S. 661. Denying the Commissioner of Patents the right to appeal from an adverse decision in the District Court would be in derogation of this public right.

upon the Commissioner of Patents an R. S. 4915 proceeding is likewise conclusive on that officer to the extent of depriving him of a right of appeal. Their reasoning is fallacious. The decision of the Court of Customs and Patent Appeals in a summary appeal authorized by R. S. 4911–14 is "not a judicial judgment" but is "merely an instruction * * * by a court which is made part of the machinery of the Patent Office for administrative purposes" and no appeal therefrom is possible. See *Postum Cereal Company* v. *California Fig Nut Company,* 272 U. S. 693, 698–699, a trademark case. See also *Pacific Northwest Canning Company* v. *Skookum Packers' Ass'n,* 283 U. S. 858 (a trademark case), and *McBride* v. *Teeple,* 311 U. S. 649 (a patent case), wherein this Court, citing the *Postum Cereal Company* case, held that it had no jurisdiction to review summary appeals decisions in R. S. 4911–14 proceedings. The decision of the Court of Customs and Patent Appeals in such a proceeding is therefore conclusive upon the Commissioner of Patents so far as an appeal is concerned, although he still has the power subsequently to disallow the claim for want of invention over a newly discovered reference to the prior art. *Hoover Co.* v. *Coe,* 325 U. S. 79, 89; *Jeffrey Mfg. Co.* v. *Kingsland,* 179 F. 2d 35 (C. A. D. C.). On the other hand, a proceeding

instituted under R. S. 4915 is a suit in equity brought in a constitutional court from which an appeal lies. Consequently, the judgment of a District Court in an R. S. 4915 action, like a judgment in any other case or controversy, is not conclusive upon the Commissioner in any sense until he has exercised his right of appeal or has had an opportunity to do so. The analogy which petitioners attempt to draw between R. S. 4911–14 proceedings and R. S. 4915 proceedings, and on which they rely, is therefore without force. In the circumstances, their contention that the judgment of the District Court is conclusive on the Commissioner in the sense that he has no right of appeal is patently without merit.[4]

[4] Petitioners raised two further points, neither of which is pertinent to the procedural question of respondent's right to appeal, and which are not necessary for discussion here. These two points are: (1) Whether the provision of R. S. 4915 that "all the expenses of the proceedings shall be paid by the applicant, whether the final decision is in his favor or not" conflicts with the Administrative Procedure Act, 60 Stat. 237, 243; 5 U. S. C. 1009 (d), empowering reviewing courts to grant relief pending review; and (2) whether the Commissioner has become an opposing party within the meaning of R. S. 4915.

CONCLUSION

The decision below is interlocutory and is clearly correct, there is no conflict of decisions, and further review is not warranted. It is re-

spectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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JOSEPH L. SWITZER and RICHARD A. WARD,
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Respondent.

REPLY BRIEF FOR PETITIONERS
On Petition for Writ of Certiorari to
The United States Court of Appeals for
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Respondent.

REPLY BRIEF FOR PETITIONERS

On Petition for Writ of Certiorari to The United States Court of Appeals for The District of Columbia.

Respondent's Brief opposing the Petition for Writ of Certiorari herein is based on contentions which carefully sidestep the questions presented by the Petition. It is respectfully submitted that, by such evasions, respondent not only reveals the unsoundness of his contentions but also emphasizes the substantial need for a review and determination by this Court of the questions presented by the Petition.

1. The first question presented in the Petition herein is whether or not the decree of the trial court below, and from which petitioners have appealed to the Court of Appeals below, is interlocutory or final. This is essentially a jurisdictional question; if the District Court's decision below is interlocutory, as petitioners contend, then the Court of Appeals below has no jurisdiction under the Judicial

Code, 28 U. S. C. 1291-2, to entertain the appeal which respondent has taken to that Court.

Respondent's oblique response to this first and fundamental question presented by the Petition is the contention that this Petition is premature, being a petition for review of the interlocutory order of the Court of Appeals below denying petitioners' motion for summary dismissal of respondent's appeal to that Court. Respondent contends: "In the instant case, should the Court of Appeals affirm the decision of the trial court, there will, of course, be no need for a review of the question presented in the petition for Writ of Certiorari." [Resp. Brief, p. 6, n. 1.]

At best, this contention of respondent is an unsound attempt to defend a radical departure from admittedly, consistent practice of the Patent Office for many years,[1] a practice which petitioners believe they have shown to be dictated, not by administrative discretion, but by law binding upon the Court of Appeals as well as upon respondent. To petitioners and all future patent applicants who have succeeded in R. S. 4915 proceedings, it would be cold comfort to know, as they face further delay and bear all expenses of proceedings on appeal regardless of the outcome

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[1] As pointed out in the petition, former Commissioner Coe was quoted by this Court in *Hoover Co. v. Coe*, 325 U. S. 79, 88, as stating that, except where new references are found or an interference is declared in the Patent Office, following adjudication of patentability in R. S. 4915 proceedings, the practice of issuing a patent to the applicant upon payment of the prescribed fee "* * * is believed to have been the consistent practice of this [Patent] Office for many years." There are no reported cases showing that intervening commissioners between Mr. Coe and the present respondent departed from the consistent practice stated. Rather, a careful review of the several R. S. 4915 cases decided adversely against the Commissioner since the *Hoover* case reveal that, except for petitions for rehearing by the trial court, both intervening commissioners, i.e., Mr. Ooms and Mr. Kingsland, have sought no review of, but accepted as conclusive, adjudications of patentability in R. S. 4915 proceedings.

of the appeal, that it is an unanswered question whether the court hearing the appeal has jurisdiction to do so. Jurisdiction of the Court of Appeals below is necessarily fundamental to further proceedings in this case.

In support of the contention that this petition is premature, respondent cites two decisions of this Court, *Hamilton Shoe Co. v. Wolf Brothers,* 240 U. S. 251, which is readily distinguishable, and *Larson v. Domestic & Foreign Corp.,* 337 U. S. 682. *The later case contradicts respondent's contention and supports petitioners' position that the Writ should be issued.*

In the *Hamilton Shoe* case, decided in 1915, this Court denied a petition for certiorari from an interlocutory decision of a Court of Appeals on the question of validity and infringement of the trademark "American Girl," but waited until there had been an accounting and award of damages under the interlocutory decision, and the decree thus became final, before granting certiorari. The rationale of the *Hamilton Shoe* case and other earlier decisions cited therein seemed to be that, in such cases, the interlocutory decree of the Court of Appeals below had already entailed one review of the facts and merits of the case presented in the trial court; before this Court would make a further review of such facts and merits, this Court would require that the entire and final record, including damages, be before it. The interlocutory ruling of the Court of Appeals, of which petitioners here seek a review, in no way embraces any of the merits of the case before the trial court but, instead, presents jurisdictional questions (which were not present in the *Hamilton Shoe* case) which were first raised, and could be raised, only in the Court of Appeals below.

The 1949 decision of this Court in *Larson v. Domestic & Foreign Corp.,* 337 U. S. 682, 685, points out that a pe-

tition which presents jurisdictional questions, as this instant petition does, falls in the class of cases which are appropriate for review even though the petitions are directed to interlocutory judgments of the courts below. As stated by this Court in the *Larson* case at 337 U. S. 685, n. 3:

> "The judgment of the Court of Appeals was not a final one but we consider it appropriate for review since, in our view, the jurisdictional issue was 'fundamental to the further conduct of the case.' See *Land v. Dollar,* 330 U. S. 731, 734 (1947)."

The case of *Land v. Dollar,* 330 U. S. 371, cited by this Court in the *Larson* case, also presented a jurisdictional question [whether the trial court had jurisdiction to hear a case directed, in substance, against the United States]. Again this Court stated, at 330 U. S. 734, n. 2:

> "Although the judgment below was not a final one, we consider it appropriate for review because it involves an issue [of jurisdiction] 'fundamental to further conduct of the case.' United States v. General Motors Corp., 323 U. S. 373, 377."

Thus, the recent *Larson* and *Land v. Dollar* cases cited above point out that petitions which present jurisdictional questions are appropriate for review and are not premature. It is respectfully submitted that the instant case especially calls for review. Whereas in the *Larson* and *Land v. Dollar* cases, the jurisdictional question involved had at least been reviewed by a Court of Appeals below, in this case, as in *Hoover v. Coe,* 325 U. S. 79, a jurisdictional question presented pertains strictly to the jurisdiction of the Court of Appeals below. This is the first and only Court in which there can be reviewed a question as to whether or not a Court of Appeals below has exceeded its jurisdiction, which jurisdiction Congress has limited in the very Judicial Code under which the existence of that Court continues.

As respondent points out, if this present petition is not granted and petitioners proceed with and succeed on the merits of respondents' appeal, there would then be no occasion to petition this Court for review of the jurisdiction of the Court of Appeals. And, of course, there is the possibility that the Court of Appeals might reverse the District Court, in which event the jurisdiction of the Court of Appeals would become secondary and academic. Upon analysis, what respondent's contention actually points out, therefore, is that the petition is not merely *not* premature; if this petition had not been presented at the present stage of the case, at any later stage in the case the question of the jurisdiction of the Court of Appeals below would be immaterial or more or less academic.

As to the fundamental question of whether the decision of the District Court below was final or interlocutory, respondent merely accuses petitioners of

> "* * * an unjustified blurring [whatever that means] of the judicial recognition of the practical and possibly continuing relationship in the future between an applicant and the Patent Office, based on material not presented in the concluded litigation." [Resp. Brief, p. 8.]

The foregoing statement merely emphasizes that respondent is not under a mandate from the District Court below but, in his own bureau, may cite additional prior art or declare an interference which could eventually bring the application in suit before the District Court below in another R. S. 4915 proceeding. The District Court decision below, as petitioners necessarily admit, does not put an end to the controversy between petitioners and respondent, namely, whether a patent should issue containing the claims of the application in suit. The decision of the District Court below is merely interlocutory and not

final. *Berman v. U. S.*, 302 U. S. 211; *Merriman v. Chicago, etc. R. Co.*, 64 F. 535; *Beighle v. LeRoy*, 94 F. 2d, 30.

It is sophistical for respondent to argue that the decision of the District Court below was final as a "practical" matter. The same contention was made by the Federal Communications Commission in *Woodmen of the World v. F. C. C.*, 922 F. 2d 122, in which the jurisdiction of the Court of Appeals was sought although it appeared that the case was subject to further proceedings before the Commission. The Court below correctly held there, at 99 F. 2d, 123:

> "Jurisdiction cannot be given to a court by consent, acquiescence or inadvertence. It can acquire jurisdiction only by authority of law. It is immaterial, therefore, what the situation may be 'as a practical matter.'"

2. As to the second question presented by the petition, namely, whether the decision of the District Court below, as the "law of the case" so to speak, was conclusive upon respondent, respondent contends:

(a) that while a decision under R. S. 4911-14 is conclusive upon respondent, a decision under R. S. 4915 is not. Respondent ignores completely the clear language of this Court to the contrary in *Gandy v. Marble*, 122 U. S. 432, 440, *American Foundries v. Robertson*, 262 U. S. 209, 213 and, repeatedly, in *Hoover Co. v. Coe*, 325 U. S. 79, 84 and 87-88.

(b) that respondent has taken appeals before in other R. S. 4915 cases. All of the cases on this point which respondent cites are distinguishable.[2] Except for *Robert-*

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[2] *Butterworth v. Hill*, 114 U. S. 128, relates to service of summons by mail in an R. S. 4915 action instituted against the Commissioner of Patents in the Circuit Court of Vermont; *Ewing v.*

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son v. Cooper, 46 F. 2d 494 [CA 4], all relate solely to appeals on questions which were procedural in nature, not appeals on the merits of the findings of the court upon the facts in the case "as the facts may appear" [R. S. 4915] to the District Court. In short, the appeals previously taken by the respondent's predecessors related to questions of procedure, interpretation of treaties, and the like, not the patentability of the claims of the application upon the facts in the case as they appeared to the District Court. Even the appeal in *Robertson v. Cooper, supra,* was not taken up primarily on a substantive question. The principal ground of appeal appears to have been on the question of whether the design of a font of type was within the scope of the design patent statutes. The Court

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(Continued from preceding page)

Standard Oil Company, 42 Apps. DC [1914] 321, affirmed the District Court decision that the Commissioner was not to conduct examination proceedings in an application for renewal of a trade mark registration under the 1905 Act, regardless of what the prior "policy of the Government" had been. *Robertson v. General Electric,* 32 F. 2d 495 (CA 4, 1929) was an appeal questioning only an interpretation of the Treaty of Berlin and the Treaty of Versailles; *Coe* and *Cunningham v. Hobart Mfg. Co.,* 102 F. 2d 270 (CA DC, 1939) relates to a "special appeal" taken by Cunningham from an interlocutory order of the District Court holding that, by naming the Commissioner as a purely formal party to an R. S. 4915 action between interfering Ohio and Illinois corporations, venue lay in the District of Columbia; the Commissioner's function in the appeal appears to have been to point out that he was not an "adverse" party and had no interest in the proceedings. The Journal of the Patent Office Society article, 26 JPOS 651, 652 [1944] "Slamming the 4915 Door" complains of then recent decisions by the Court of Appeals for the District of Columbia (such as *Hoover Co. v. Coe,* 62 U. S. P. Q. 115), in which appeals were taken by applicants; the article expresses the hope that this Court would grant certiorari in the *Hoover* case; the pertinence of the article is not apparent.

What the practice has been with respect to appeals from decisions relating to pure procedural questions in the Patent Office or the courts, that is, from decisions on questions falling outside the confines of R. S. 4915, seems to have no bearing on the right to appeal from an adjudication on the merits of a decision involving questions only within the confines of R. S. 4915.

of Appeals decided the case on the ground that the particular type style before it was not new in the art. In citing authority for reviewing the merits of the decision of the trial court, the Court of Appeals in the *Cooper* case cited *Robertson v. General Electric Co.*, 32 F. 2d 495, a case dealing with the effect of a treaty. One possible error of the Court of Appeals for the Fourth Circuit in 1930 does not, it is submitted, justify the Court of Appeals below in disregarding the statutory limits clearly set upon its jurisdiction by sections 1291 and 1292 of the Judicial Code of 1948 or warrant respondent's disregard of the conclusiveness of the District Court's decision, equivalent with a decision under R. S. 4911-14, as pointed out repeatedly by this Court, particularly in the 1944 *Hoover* case.

3. Respondent completely evades the third and fourth questions raised by the petition, namely, (3) that the concept that respondent may appeal (with all expenses in the proceedings to be borne by the successful appellee-plaintiffs) conflicts with subsequent Acts of Congress and (4) respondent's conduct herein was *ultra vires*. Respondent necessarily evades these questions to make the contention:

> "Consequently the judgment of a District Court in an R. S. 4915 action, *like a judgment in any other case or controversy,* is not conclusive upon the Commissioner in any sense until he has exercised his right of appeal or has had an opportunity to do so." [Resp. Brief, p. 11, emphasis supplied.]

The whole burden of the third and fourth questions raised by petitioners is that an R. S. 4915 decision adverse to respondent is not just "any other case or controversy." R. S. 4915 creates a special statutory action in which respondent (by the provision that patent applicants must bear all expenses regardless of the outcome) would be re-

lieved (if it were contemplated that he could or would appeal) of all restraints upon taking an appeal, such as responsibility for appeal costs, undue delays and supersedeas. These are restraints Congress has imposed on appeals in ordinary controversies and are parallel to restraints which Congress specifically imposed upon Government agencies by the Administrative Procedure Act. In any ordinary case or controversy, petitioners could join and secure relief against the potential infringers who obviously promoted and inspired respondent's resistance to the District Court's decree below; in an R. S. 4915 proceeding petitioners are unable to do so.

CONCLUSION.

In footnote 3 of respondent's brief it is pointed out that the public has a substantial interest in the granting of every patent. As evident from the Constitution and from the history of the patent statutes, one such public interest is that patents, when found warranted, be granted upon due proceedings according to law. It is clearly not in the public interest either to delay the issuance of petitioners' patent or to exceed the jurisdiction of the courts or the authority of respondent in effecting such delay. Granting of the Petition herein is respectfully requested in order to foreshorten the delay, expense, and irreparable injury involved in the unwarranted appeal which respondent has taken in this case and, by opposition to this Petition, reveals that he intends to take in future R. S. 4915 proceedings.

Respectfully submitted,

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